

**KROGER**

*Personal*  
FINANCE®

1014 Vine St. Cincinnati, OH 45202

December 21, 2009

*Via E-Mail*

Jennifer J. Johnson  
Secretary, Board of Governors of the Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue, NW  
Washington, DC 20551  
Attention: Docket No. R-1377

Re: Proposed Rule – 12 CFR Part 205  
Regulation E; Docket No. R-1377  
Electronic Funds Transfer

Dear Ms. Johnson,

Kroger Personal Finance, LLC (“KPF”) is pleased to provide our comments to the Federal Reserve Board of Governors (the “Board”) on the proposed rules (the “Proposed Rules”) amending Regulation E to implement certain provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the “CARD Act”), published in the Federal Register on November 20, 2009. The CARD Act would, among other things, restrict the ability to impose dormancy, inactivity or service fees on certain prepaid products and prohibit the sale or issuance of such products if they have an expiration date of less than five years. The Proposed Rules address fees, expiration dates and disclosure requirements for such prepaid products, as well as clarify exemptions from those requirements. KPF applauds the Board and the excellent job that it did in protecting consumers with these portions of the CARD Act and the Proposed Rules.

KPF, distributing cards through Kroger affiliates, is one of the largest national grocery retailers that sells prepaid cards, both open and closed loop. Kroger has approximately 2,480 store locations in 31 States of States in the United States. KPF is committed to the practice of informing and protecting consumers. We greatly appreciate the opportunity to comment upon the issues raised in the Proposed Rules.

I. Expiration Dates.

A. Automatic replacement of expired reloadable gift cards should not be required.

The Board has solicited comment on whether issuers should be required to automatically issue replacement cards to consumers before a card expires for reloadable gift cards<sup>1</sup> if the funds do not expire at the same time as the card. We strongly believe that issuers should not be required to automatically issue replacement cards to consumers before funds expire if the funds and the reloadable card do not expire at the same time. To ensure compliance, our retail outlets may be required to obtain personal information from purchasers at POS. As many of these products are intended as gifts, purchasers would most likely be unable to provide such information at POS about the recipients. In addition, we have serious concerns about how obtaining this information at POS would delay our checkout lanes, both inconveniencing the card purchaser and those waiting in line.

B. Alternatives regarding card and funds expiration.

The Board has proposed two alternatives regarding the disclosure of the expiration date of underlying funds and the card itself in Section 205.20(e) of the Proposed Rules and solicited comment on the two proposed alternatives. Under alternative A to Section 205.20(e) of the Proposed Rules (“Alternative A”), a person may not sell a gift certificate, store gift card, or general-use prepaid card subject to an expiration date unless the certificate or card expiration date is at least five years after the date the certificate or card is sold or issued to a consumer. Under alternative B to Section 205.20(e) of the Proposed Rules (“Alternative B”), a person may not sell or issue a card with an expiration date unless there are policies and procedures in place to ensure a consumer has a reasonable opportunity to purchase a card with at least five years remaining until the expiration date. KPF is supportive of Alternative A as long as Alternative B is also available. Adopting Alternative A would likely impose technological challenges to us as our retail outlets would need to determine at POS and before purchase if enough time remains before the plastic expires on the card. Our POS systems would most likely be required to receive a message from card processors that a card authorization is rejected because the card will expire before 5 years after purchase. Receiving this message at POS would likely require system upgrades, which would likely be very expensive and take more than 6 months to implement. Even if our POS systems were updated, this alternative would also pose serious challenges at POS as our retail outlets would likely need to take time at the check out lines to assist purchasers in finding a card with the requisite expiration date.

We would also ask the Board to clarify Alternative B and provide in the final rules that if an issuer has reasonable policies and procedures in place to ensure a consumer can purchase a card with at least five years remaining until the expiration date, then a retailer should not be penalized for accidental sales outside of such policies and procedures. Much like a retail clerk accidentally placing a general-purpose reloadable card on a rack

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<sup>1</sup> i.e. reloadable cards subject to the CARD Act as opposed to reloadable cards that are not marketed or labeled as gift cards.

with gift cards (which, under the Proposed Rules would not disqualify such a card from the exclusion under the CARD Act), any employee at an issuer or retailer could inadvertently cause the sale of cards that would not comply with the Act. For example, a box of cards that may need to be destroyed due to the dates printed no longer being within the required timeframe could inadvertently be sent to our retail stores for display. If such acts fall outside of the policies and procedures put into place, a retailer should not be penalized.

## II. Exclusions.

### A. Exclusion for cards usable for telephone services should be expanded.

Under the CARD Act, the terms gift certificate, store gift card and general-use prepaid card do not include any card, code or other device that is useable solely for telephone services. The Proposed Rules also clarify that this exclusion includes prepaid products that may be used for other services that are analogous to telephone services, such as products for voice over internet protocol (VoIP) time. The Board has solicited comment on the expansion of this exclusion to include other prepaid cards that may be redeemed for similar or related technology services, such as cards used to obtain Internet access or mobile broadband time. We urge the Board to expand this exclusion to include prepaid cards that may be redeemed for similar or related technology services. In a time when technology surrounding telephones and mobile telephones is broadly and quickly expanding, interpreting this exclusion narrowly may lead to a suppression of prepaid products that would serve consumers greatly. In addition to covering analogous telephone services like VoIP, the exclusion should also cover prepaid cards that would enable cardholders to utilize all applications on mobile telephones, such as Internet or other applications typically associated with Blackberry or iPhone type mobile devices.

### B. Exclusion for reloadable cards not marketed or labeled as a gift card should be clarified.

Section 205.20(b) of the Proposed Rules provides, among other things, that a gift certificate, store gift card and general use prepaid card do not include any card, code or other device that is reloadable and not marketed or labeled as a gift card or gift certificate. The Board solicits comment regarding the marketing and labeling of gift cards and on whether the proposed examples provide sufficient guidance regarding policies and procedures to avoid marketing general purpose reloadable cards ("GPR Cards") as gift cards. While we agree that the marketing or labeling as gift cards of cards that are otherwise exempt would lead to confusion for consumers and such marketing should remove the exclusion from such cards, certain activity should not qualify as marketing under this provision. Any marketing, commercials or in-store advertisements that do not specifically reference exempt cards, like GPR Cards, but that instead generally reference the availability of gift cards (whether or not particular gift cards are highlighted) in a store should not nullify the exclusion for GPR Cards. Such in-store general marketing of gift cards is often utilized to inform consumers of the location and availability of such cards. We do not believe that such marketing is likely to create consumer confusion resulting in a consumer mistakenly purchasing a GPR Card rather than a gift card. If such advertising is not permitted, we believe it will seriously limit the accessibility the GPR Cards for consumers. Given the choice between discontinuing

such advertising and discontinuing the sale of GPR Cards, we would likely discontinue selling the GPR Cards

In addition, certain types of GPR Cards enable a cardholder to add an additional cardholder to its account. The added card would not be given as a gift, but rather the cardholder of such cards would simply add another account holder and give the added card to the second cardholder for his personal use, such as for budgeting or household expense purposes. In such circumstances, we urge the Board to clarify that marketing a card as having such a "giving" option should not be deemed to be marketing or labeling a card as a gift card.

The Proposed Rules provide that the exclusion for not marketing a reloadable card as a gift card would apply even if a retail clerk inadvertently stocks or places a GPR Card on a gift card display. KPF appreciates that such behavior should not remove the exclusion from GPR Cards, but urges the Board to extend the exclusion to include the inadvertent acts of anyone placing cards on a display rack or placing marketing or advertisements regarding gift cards or GPR Cards. For example, despite clear merchandising instructions, a third party merchandiser utilized for our retail outlets could mistakenly put a GPR Card on the "gift card" rack. In addition, a consumer who considered and rejected purchasing a GPR Card could easily put the GPR Card back on the "gift card" rack. We also note that a gift card, clearly labeled as such, could mistakenly be placed on the "GPR Card" display. These are just a few of the numerous examples of how this could occur. We do not believe that the Board intended to limit the inadvertent acts to only retail clerks or one type of display, and thus such an expansion is warranted. We also urge the Board to clarify that such an exclusion would apply to the placement of cards on whatever form of display the Board ultimately deems appropriate. In other words, if the Board clarifies that a single display with clear divisions is acceptable for the sale of gift cards and GPR Cards, the accidental placement of a GPR Card on the incorrect portion of a display should not remove the exclusion from GPR Cards.

The Proposed Rules indicate that any GPR Cards or non-gift prepaid products could be deemed gift cards if they are sold from a display that is labeled "gift cards" and that separate displays should be used to sell such cards. We believe that GPR Cards should be able to be placed on the same larger display rack as gift cards, as long as there is a clear delineation between the different types of cards in order to make it clear to a consumer that there are both gift cards and GPR Cards on the rack. This can be accomplished through displaying GPR Cards on separate sides of a rack with a sign at the top of such side indicating GPR Cards are for sale or through a clear border surrounding such cards. So long as we have policies and procedures in place to segregate different types of cards, the mere fact that GPR Cards are placed on the same rack as gift cards or near gift cards should not remove such GPR Cards from this exclusion.

Requiring separate displays would cause us considerable difficulties, especially in our smaller retail outlets and stores with limited space. Display space is valuable "real estate" in the retail setting, which we allocate thoughtfully. In addition, there are substantial costs associated with the production of displays and the signage for such displays. Such costs alone could serve as a deterrent from our adopting the use of multiple displays. Before providing space for a second display, we would seriously consider discontinuing the sale of GPR Cards. Unfortunately, we recognize that this decision may significantly

restrict access of these economical and beneficial products for the unbanked and underbanked. We request that the Board clarify that the same display case can be used for both gift and non-gift cards, provided any of the following apply: (i) the sections for each product are clearly labeled or otherwise distinct from each other by use of colors, design and/or signage; (ii) the display has a generic label such as "prepaid cards;" (iii) the top signage communicates, in a manner to avoid consumer confusion, that both gift and non-gift cards are available for sale on the same display and sections for each product are clearly labeled or otherwise distinct from each other by use of colors, design and/or signage; or (iv) the non-gift card is clearly labeled on the outside of its package that it is not a gift card.

We note that products are marketed in many ways in retail, including the use of circulars, catalogues and other advertising. The Board's comments on displays could be read to mean that gift and GPR Cards could not be advertised in the same advertising material, the way that we advertise other products like canned vegetables or frozen food. If a bona fide error has occurred with an advertisement or marketing piece and GPR Cards are marketed as gift cards as a result, so long as such an ad is retracted or the subsequent ad is corrected and the GPR Card is replaced with a gift card or returned if the issuer does not offer a gift card, this should be sufficient to keep the GPR Card within the exclusion. We request that the Board clarify that the same advertising material can be used for both gift and non-gift card as long as they are not included in the same box or section in the material. We would also like the Board to clarify that the consequence of any bona fide error in advertising gift and non-gift cards would be for the advertiser to retract the advertisement as soon as practicable after the error and either send a replacement gift card to any consumer who purchased a non-gift card in reliance on the faulty advertisement or refund the consumer's money.

### III. Transition/grandfathering issues.

The Board solicits comment on whether it should consider rules to grandfather gift certificates, store gift cards or general-use prepaid cards that are in the marketplace as of the effective date of the CARD Act from some or all of the requirements set forth in the Proposed Rules. We request that the Board implement rules to provide a two year time period for cards that are out on the racks to comply with all of the requirements set forth in the rulemaking.

If the final Board rules are issued on February 22, 2010, the prepaid card industry will have 6 months to produce and merchandise new stock, as well as remove old stock, and possibly manufacture and install new displays and signage. As issuers and sellers of gift and GPR Cards rely on a limited number of third party vendors for services such as display manufacturing and merchandising, these vendor resources will be hard pressed to meet the needs of the affected members of the prepaid industry by the compliance deadline. The cost and burden to pull and replace all cards from stores and, if necessary, install new displays would likely be significant on us. We request that the Board implement rules to provide a two year time period for "non complying" cards that are already in distribution or on display for sale on August 22, 2010, provided that fee and expiration date restrictions and disclosure requirements of the CARD Act still apply to such cards.

The grandfather time period of two years to replace cards in the marketplace would allow us to sell cards with the required disclosures, such as valid through dates, and comply with marketing requirements for preserving the exemption for GPR Cards without the significant costs associated with immediate compliance. Older stock should be permitted to be sold so long as there is clear signage on displays and POS and/or website or Interactive Voice Response notice (for cards that must be activated or registered). New terms should be available for download on websites or mailed upon request, at no charge, through Interactive Voice Response systems. Finally, issuers should have the option of “stickerizing” older stock with permanent or difficult to remove stickers (together with a message not to remove) that advises consumers of the new fee and expiration date terms, if any. Fees should be suppressed for the initial 12 months of inactivity after sale, free replacement cards should be made available, and other requirements in the Rules (other than related to disclosure of terms on the card or card packaging) should apply.

KPF supports the goals of the Board and the Proposed Rules and we respectfully urge the Board to consider and adopt our recommendations set forth herein. Thank you for the opportunity to comment on this important matter.

Sincerely,

Jeff Talbot  
Chief Marketing Officer  
Kroger Personal Finance, LLC